BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDOLPH A. DODSON	)	
Claimant	)	
	)	
VS.	)	
	)	
PEOPLEASE[1]	)	
Respondent	)	Docket No. 1,042,494
	)	
AND	)	
	)	
ARCH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 15, 2009, preliminary hearing Order For Compensation and the January 26, 2009, Nunc Pro Tunc Order for Compensation entered by Administrative Law Judge Brad E. Avery. James E. Martin, of Overland Park, Kansas, appeared for claimant. M. Joan Klosterman, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained an accidental injury that arose out of and in the course of his employment with respondent as alleged. The ALJ ordered respondent to pay temporary total disability compensation from January 13, 2009, to the date of the court-ordered independent medical examination.[2]

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[1] The Application for Hearing and the ALJ's Order for Compensation list the employer/respondent as MOKAN Distribution Services, Inc. However, on January 26, 2009, the ALJ, upon motion of respondent and after consultation with the parties, entered an Order that the employer/respondent in the above case be designated as PeopLease and that MO-Kan Distribution Service, Inc., be removed as the employer/respondent. The ALJ entered a Nunc Pro Tunc Order for Compensation showing "PeopLease" as respondent.

[2] Claimant had requested that temporary total disability compensation begin September 24, 2008. See P.H. Trans. at 5.

Further, the ALJ ordered respondent to pay unauthorized medical up to the applicable limit.[3]

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 13, 2009, Preliminary Hearing and the exhibits; the transcript of the deposition of Randolph Dodson taken November 7, 2008, and the exhibits; together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant sustained an accidental injury arising out of and in the course of his employment. Respondent argues that claimant is not credible; that there is no evidence that claimant sustained an accidental injury at work on September 24, 2008; that claimant's complaints are the natural and probable consequence of a prior injury; and that the alleged September 24, 2008, event did not aggravate claimant's low back injury because it did not result in a change of pathology. Respondent also argues the ALJ should not have found that claimant suffered an accident and injury that arose out of and in the course of his employment with respondent and should not have awarded preliminary benefits, including temporary total disability benefits, until after he received and reviewed the report of claimant's court-ordered independent medical examination.

Claimant contends the evidence shows he suffered personal injury by an accident that arose out of and in the course of his employment when he hit a bump in the road and felt a sharp pain in his back. He argues he is, therefore, entitled to temporary total disability compensation and other benefits.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by an accident that arose out of and in the course of his employment with respondent? Specifically, did claimant suffer a new, separate and distinct accident and injury, or is his condition a direct and natural consequence of a prior accident, injury and preexisting condition?

(2) Is claimant entitled to temporary total disability benefits?

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[3] The ALJ did not order respondent to provide authorized medical treatment. Although the ALJ's order was silent as to claimant's request for treatment, it appears that the ALJ is withholding a decision on additional medical treatment until after his receipt of an independent medical report from Dr. Mark Bernhardt.

FINDINGS OF FACT

Claimant is alleging he injured his back on September 24, 2008, while working for respondent as an over-the-road driver. On that day, he was driving from Kansas City to Wichita when he hit a bump in the road near Emporia at about 6 a.m. He immediately felt a sharp pain in his low back. When he got to Wichita, he called his employer and reported that his back was bothering him. He then called Dr. Raymond Schwegler, his personal physician, and told him what happened and requested a prescription for pain medication. Upon his return to Kansas City that day, he spoke with Lloyd Van Horn, respondent's driver supervisor, telling him that his back had gone out and he was in severe pain. He asked Mr. Van Horn about filing a workers compensation claim and asked if filing such a claim would affect his job.

Claimant did not go to work on September 25 because of his back pain. He saw Dr. Schwegler on September 26, 2008, telling him he had acute low back pain on September 24 with no specific onset. Claimant filled out a report of accident on September 30, 2008, in which he said the injury occurred when he was "driving [a] truck down [a] road and pain came on fast."[4] There was no mention in the accident report that claimant's truck hit a bump in the road.

It is uncontradicted that claimant had preexisting back injuries. He first injured his low back in an automobile accident in 1995. An MRI performed on January 15, 1996, showed that he had dessication of the L2-L3, L3-L4 and L5-S1 discs; large Schmorl's notes at L3 and L4; a far lateral right sided disc extrusion at L4-L5; and a probable central but slightly right sided disc protrusion at L5-S1. Claimant states he made a good recovery from that accident.

More recently, claimant was involved in a roll-over accident in August 2005 when he was driving a truck for a previous employer, SLX, Inc. He began having symptoms in his low back two or three days after that accident, and the pain radiated down his right leg down into his foot. An MRI was performed on October 3, 2005, that revealed a focal disc protrusion at L3-L4 extending posterior to the L3 vertebral body and causing moderate central stenosis; an apparent disc fragment in right lateral recess at L4-L5; and diffuse narrowing of disc spaces with marked disc desiccation at L2-L3, L3-L4, L4-L5 and L5-S1. When compared with 1996 MRI, the fragment in the far right lateral recess at L4-L5 was present but appeared to be a complete disc fragment; there was a new disc protrusion present at L3-L4, and the previously seen disc protrusion at L5-S1 now had an appearance consistent with a disc bulge. Claimant was treated by a chiropractor and also by an orthopedic surgeon, Dr. Terrence Pratt. Dr. Pratt's March 31, 2006, report indicated that claimant complained of continuous right low back pain that more recently also involved the left low back as well, with symptoms that radiated posteriorly to the ankle on the right and

[4] P.H. Trans., Resp. Ex. F.

subsequently into the dorsum of the foot. Claimant was treated with epidural steroid injections.

Claimant filed both a workers compensation claim and a civil action as a result of the August 2005 accident. At the request of his attorney in his prior workers compensation claim against SLX, Inc., his prior employer, he was seen by Dr. Edward Prostic on December 27, 2005, and again on September 26, 2006. After examination, Dr. Prostic stated in his report of September 26, 2006: "It continues to be my opinion that on or about August 18, 2005, [claimant] sustained injury to his low back with development of L5 radiculopathy. His symptoms have decreased with time and treatment. He may require additional injections and/or surgery in the future."[5]

Claimant was also seen by Dr. Geoffrey Blatt on August 7, 2006, at the request of the respondent in the prior workers compensation claim. Dr. Blatt's report indicates that the MRI done October 3, 2005, showed claimant had multiple degenerative and bulging discs from L2 down to S1 with possible lateral foraminal stenosis at L3-L4 and L4-L5. The L5 nerve root was not obviously pinched. Claimant had epidural steroid injections, and his symptoms had resolved other than back stiffness and discomfort. Dr. Blatt opined: "Based on his history, physical examination and imaging studies, I believe [claimant] has lumbar spondylosis and sounds as if he was suffering from an L5 radiculopathy that is now resolved."[6]

Claimant testified that he really did not have any pain after the epidural injections he received after the 2005 accident. Even though he had a disability because of his herniated discs, he considered himself cured, although at times he still had pain in his back. Claimant was off work about a year after the work-related roll-over accident in August 2005. He eventually settled his workers compensation case, closing all issues, including future medical. He also settled his third party civil action. He returned to work for SLX, Inc., but quit that job after a few months because he was working too many hours. He started working for respondent in March 2007.

In March 2008, claimant suffered a recurrence of his low back symptoms. He does not know what caused the symptoms to return. He sought treatment from his personal physician, Dr. Schwegler, on March 7, 2008. At that time, he complained of low back pain with an acute onset. He said the pain had been occurring in a persistent pattern for 10 years. Dr. Schwegler ordered an MRI and referred him to Dr. Paul O'Boynick, a neurosurgeon. The MRI was performed on March 11, 2008, and revealed that claimant had disc degenerative changes at multiple levels and a broad based L5-S1 disc protrusion, greater to the left of midline, causing left L5 and S1 nerve root impression. Broad based

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[5] P.H. Trans., Cl. Ex. A-1 at 4.

[6] P.H. Trans., Cl. Ex. 2 at 2.

disc herniation was suggested. Claimant further had a broad based disc protrusion at L4-L5 causing bilateral foraminal narrowing and central spinal stenosis.

Dr. O'Boynick's report of March 26, 2008, indicates that claimant complained of right leg pain that went down to the ankle. Dr. O'Boynick believed that claimant suffered from a herniated lumbar disc on the right at L4-L5. Claimant and Dr. O'Boynick discussed treatment options, including a series of lumbar epidural steroid injections versus having a diskectomy. Claimant opted to have the injections. Dr. O'Boynick referred claimant to Dr. Timothy Lair for the injections. Claimant was off work three months while he received the epidural injections.

Dr. Lair performed lumbar epidural steroid injections on claimant on April 4 and April 22. He saw claimant on May 14, 2008, at which time claimant said he had overall about a 35 percent improvement of his symptoms, predominantly in his right lower extremity. He continued to have axial low back and buttock pain, left greater than right. Dr. Lair recommended a repeat steroid injection, which was apparently performed on May 17, 2008.

Claimant returned to Dr. Schwegler on May 29, 2008. Dr. Schwegler recorded the following entry under "Low Back Pain (Reason for Visit)":

> The patient is a 53 year old male who presents with a complaint of low back pain. The onset of the low back pain has been gradual following an incident not at work and has been occurring in an intermittent pattern for 10 years. The course has been decreasing (After recent epidural injections x 3). The low back pain is described as a moderate dull aching. The low back pain is described as being located in the lower back. The pain radiates to the lateral aspect of left leg. There have been no aggravating factors. The back pain is relieved by bedrest. The low back pain was preceded by trauma. Previous diagnostic tests include MRI - lumbar spine. Previous evaluations have included neurosurgeon. There has been no previous spine surgery. The pain interferes with work severely. There have been no secondary gains. Low Back Pain notes: Problems with back followed auto accident in 1995 and again 2005. Improved considerably with epidural injections in 2005. Recent epidural injections have been successful. Thinks that he can return to work as a truck driver at this time. Had recent neurosurgical eval and MRI that showed a herniated disc ant [*sic*] L4-5 on the Rt and a bulged disc on the left at L5-S1.[7]

Claimant returned to work in June 2008 and testified he was only having very little problems with his low back until the incident on September 24.[8] And Dr. Schwegler's

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[7] P.H. Trans., Resp. Ex. A-2 at 7.

[8] Dodson Depo. at 105.

records show that claimant was not pain free when he was released to return to work on May 29, 2008.

Claimant returned to Dr. Schwegler on September 26, 2008. Dr. Schwegler's office note of that date does not show that claimant told him that he had hit a bump in the road before feeling pain in his low back. Instead, the doctor's records show that claimant stated he was driving his truck but that there was no specific injury at the onset of his low back pain. Dr. Schwegler advised claimant to use Hydrocodone as needed. Further, his notes states that claimant indicated: "He may pursue workmans' comp since the pain returned during his work."[9]

On October 24, 2008, claimant was again seen by Dr. Prostic at the request of claimant's attorney. Claimant gave a history to Dr. Prostic of driving near Wichita when he hit a significant bump and injured his low back. Dr. Prostic noted that he last saw claimant on September 26, 2006, at which time he had decreasing symptoms of L5 radiculopathy on the right. Claimant told Dr. Prostic that he has frequent pain from his low back to right ankle. Dr. Prostic noted that the MRI of March 11, 2008, showed central spinal stenosis at L3-4 greater than at L4-5 and lateral recess stenosis at the lower lumbar levels with right-sided disc protrusion at L4-5 and central and slightly left-sided at L5-S1. Dr. Prostic opined: "On or about September 24, 2008, [claimant] sustained additional injury to his low back during the course of his employment, aggravating pre-existing disease."[10]

At the request of respondent, claimant was seen by Dr. David Clymer on December 10, 2008. Claimant complained to him of constant pain involving the low back and right leg. Although claimant had similar symptoms in the past, he believed his current symptoms were the result of a work-related event that occurred on September 24, 2008. Dr. Clymer stated: "I understand from his history and from the medical records that there was really no major accident or event at that time. Instead, [claimant] notes that his truck hit some sort of a bump in the roadway, jarring his low back, causing increased back and leg discomfort at that time."[11]

Dr. Clymer ordered an MRI on claimant's lumbar spine before his December 10 examination. That MRI, performed November 25, 2008, revealed that claimant had multilevel lumbar spondylosis, greatest from L2-L3 through L5-S1. There was a diffuse disc bulge with spinal stenosis and a small extruded disc fragment at the right lateral recess causing right lateral recess narrowing. At L5-S1, there was a bilobed central disc protrusion. Upon review of the results of that MRI, Dr. Clymer opined:

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[9] P.H. Trans., Resp. Ex. A at 77.

[10] P.H. Trans., Cl. Ex. 1 at 3.

[11] P.H. Trans., Resp. Ex. B at 2.

> "In my opinion, this most recent MRI study does not demonstrate evidence of any new, well-localized, distinctly different abnormality. Instead, this study demonstrates findings consistent with the multilevel degenerative spondylosis, degenerative disk disease, and degenerative facet arthropathy which have been well documented in the past. While there are significant disk degeneration with disk bulging at multiple levels and multiple reasons which might explain this gentleman's back and lower extremity discomfort, there are no findings which appear to be significantly or substantially different from those noted in his previous MRI studies."[12]

Dr. Clymer believed that claimant's presentation was most compatible with chronic, progressive, degenerative lumbar spondylosis with multilevel degenerative disk disease, facet arthropathy, canal narrowing, foraminal narrowing, and associated mild radiculopathy. He further opined:

> To a reasonable degree of medical certainty, I do not believe that the work-related events on September 24, 2008 resulted in a significant or substantial change in this progression but instead represent a minor additional aggravation in this long history of progressive degenerative lumbar spondylosis. His new radiographic and MRI studies do not demonstrate any new well-localized problem which could be clearly related to this recent minor work event. Instead, he continues to have evidence of diffuse multilevel involvement with findings similar to those noted in the past. Consequently, I feel Mr. Dodson's current clinical and subjective problems are the result of a natural progression of this pre-existing degenerative process and not the result of any specific new work-related injury."[13]

Further, he stated that if claimant decided to have surgery, "I feel this surgery is exactly the same procedure which would have been appropriate in early 2008 when he was evaluated with recurrent increasing symptoms and similar MRI findings."[14]

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

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[12] P.H. Trans., Resp. Ex. B at 4.

[13] P.H. Trans., Resp. Ex. B at 6.

[14] P.H. Trans., Resp. Ex. B at 7.

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[15] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[16]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[17]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[18] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[19] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[20]

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers

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[15] K.S.A. 2008 Supp. 44-501(a).

[16] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[17] *Id.* at 278.

[18] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[19] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[20] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

compensation turns on whether claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[21]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[22] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[23] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[24] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[21] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[22] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[23] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[24] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber,*[25] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[26]

In *Logsdon*,[27] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
>
> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

Finally, in *Casco*,[28] the Kansas Supreme Court states: "When there is expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[29] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[25] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[26] *Id.* at 728.

[27] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[28] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

[29] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[30]

ANALYSIS

Claimant has suffered multiple injuries to his low back. He has undergone several courses of epidural steroid injection treatments to help his low back and radicular pain symptoms. These treatments have only afforded claimant temporary relief. In addition, claimant was diagnosed with degenerative and bulging discs at multiple levels and surgery was discussed before this most recent incident.

Claimant was off work for approximately one year following his August 2005 accident. Claimant has also missed work due to back pain since working for respondent. Claimant missed three months of work beginning in March until June 2008. When claimant saw Dr. Schwegler on March 7, 2008, he described a persistent pattern of back pain for 10 years. An MRI of claimant's spine was obtained on March 11, 2008, which revealed degenerative changes at multiple levels, including disc protrusions at L5-S1 and L4-L5 suggestive of disc herniations and nerve root impingements. Claimant testified that he had very little problems with his low back after he returned to work in June 2008 until September 24, 2008. However, the office records of Dr. Lair say that claimant had reported only about a 35 percent improvement of his symptoms as of May 14, 2008, mostly of his right leg symptoms, but that he was still having low back and buttock pain, left side greater than right. When claimant saw Dr. Schwegler on May 29, 2008, he reported significant improvement from the series of epidural injections, but he was still having moderate low back pain.

Dr. Prostic was given a history by claimant of experiencing a sudden onset of pain after hitting a bump in the road on September 24, 2008. Dr. Prostic did not have the benefit of comparing the before-and-after MRI films, but he did have the benefit of examining claimant both before and after September 24, 2008. He opined that the incident of September 24, 2008, caused claimant additional injury and aggravated the preexisting condition.

Dr. Clymer compared the MRI taken November 25, 2008, with claimant's previous MRI and saw no significant difference. He opined that while the work-related event of September 24, 2008, did not result in any significant or substantial change in claimant's condition, it did cause a minor aggravation of claimant's progressive degenerative condition. Dr. Clymer went on to opine that claimant's current problems are the result of a natural progression of his preexisting condition. Dr. Clymer further stated that if claimant were to decide to have surgery now, it would be the same procedure that would have been

[30] K.S.A. 2008 Supp. 44-555c(k).

appropriate in early 2008 when claimant was experiencing a similar increase of his symptoms.

This Board Member finds that claimant suffered an accident and injury while working on September 24, 2008, and that the accident aggravated claimant's symptoms, at least temporarily. The question is whether this accident arose out of claimant's employment and is compensable as a new accident and injury or whether, instead, the worsening was a direct and natural consequence of claimant's prior injury and preexisting condition.

As in *Gillig*, claimant's preexisting condition had never healed. Similarly, in *Logsdon,* the Kansas Court of Appeals noted that the claimant's condition had improved after surgery but it never returned to its full potential and had continued to cause claimant problems on a regular basis. The expert medical witness testimony was that absent the preexisting condition and prior injury, claimant would most likely not have suffered the most recent injury from such a trivial event. Applying the direct and natural consequence rule, the court found the new injury was compensable as a direct and natural consequence of the prior injury.

Given the ongoing nature of claimant's preexisting problems as evidenced by the claimant missing work and undergoing treatments in March through June 2008, and considering the relatively minor trauma claimant experienced on September 24, 2008, this Board Member finds that claimant's current condition is a direct and natural consequence of his prior injuries and degenerative back condition. This worsening of claimant's condition would have occurred even absent the incident on September 24, 2008. Furthermore, driving over a bump in the road most likely would not be characterized as "a distinct trauma-inducing event out of the ordinary pattern of life" but instead was "a mere aggravation of a weakened back."[31] Based upon the record presented to date, claimant has failed to prove that this claim is compensable.

CONCLUSION

Claimant's accident and injury of September 24, 2008, is not compensable as a new, separate and distinct accident and injury that arose out of and in the course of his employment with this respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Compensation dated January 15, 2009, and the Nunc Pro Tunc Order for Compensation dated January 26, 2009, entered by Administrative Law Judge Brad E. Avery are reversed.

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[31] *Logsdon*, 35 Kan. App. 2d at 84 (quoting *Graber,* 7 Kan. App. 2d 726, Syl.).

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: James E. Martin, Attorney for Claimant
M. Joan Klosterman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge